Supreme Court, U.S.
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No. ____

IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

MENACHEM PRI-HAR,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether a criminal defendant, who conclusively establishes on appeal that he is innocent of the crimes for which he has been convicted, is denied his statutory right of appeal under 28 U.S.C. § 1291 and his due process right under the Fifth Amendment to be free of arbitrary arrest and imprisonment, where the court of appeals affirmed the defendant's conviction by summary order without any supporting findings or reasoning?

2. Whether the district court committed plain error in its jury instructions on willfulness, in a fraud case, by instructing the jury that it only had to find that Petitioner was generally aware of the unlawfulness of his conduct—*not* that he knew he was breaking a particular law—in light of this Court's recent decision in *Ratzlaf v. United States*, 114 S. Ct. 655 (1994)?

3. Whether a criminal defendant, whose trial counsel for no principal reason simply refuses to defer to the defendant's express written instructions to argue numerous substantive defenses and exculpatory evidence in summation, is denied his Sixth Amendment right to the effective assistance of counsel?

PARTIES TO THE PROCEEDING

The parties to the proceeding in the United States Court of Appeals for the Second Circuit were those parties named in the caption of the case in this Court.

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PETITION FOR WRIT OF CERTIORARI

Petitioner, Menachem Pri-Har, respectfully requests that a Writ of Certiorari be issued to review a judgment of the United States Court of Appeals for the Second Circuit entered in the above-captioned proceeding on January 3, 1995.

OPINIONS BELOW

The unpublished opinion of the United States Court of Appeals for the Second Circuit, entitled *United States of America v. Menachem Pri-Har,* Docket No. 94-1305, is reprinted in the appendix hereto at pp. 1A-4A.

The decision of the United States Court of Appeals for the Second Circuit denying Mr. Pri-Har's petition for rehearing with suggestion for rehearing in banc bears the same caption and is reprinted in the appendix hereto at 10A.

The United States District Court for the Southern District of New York (Sprizzo, J.) did not write an opinion relevant to the issues raised in this petition. Portions of the transcript of the trial proceedings relevant to the issues raised in the petition appear in the appendix hereto at pp. 5A-9A.

JURISDICTION

Judgment was entered against petitioner in the United States District Court for the Southern District of New York on July 20, 1994. The United States Court of Appeals for the Second Circuit affirmed this judgment by summary order on January 3, 1995. Thereafter, a petition for rehearing with suggestion for rehearing in banc was denied on February 23, 1995. This Court has jurisdiction to review the judgment of the Court of Appeals under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED

The Fifth Amendment to the United States Constitution:

> No person shall . . . be deprived of life, liberty, or property, without due process of law.

The Sixth Amendment to the United States Constitution:

> In criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense.

28 U.S.C. § 1291:

> The courts of appeal . . . shall have jurisdiction of appeals from all final decisions of the district courts of the United States. . . .

Rule 10 of the Rules of the Supreme Court which reads in pertinent part as follows:

CONSIDERATIONS GOVERNING REVIEW ON WRIT OF CERTIORARI

.1. A review on writ of certiorari is not a matter of right, but of judicial discretion. A petition for writ of certiorari will be granted only when there are special and important reasons therefore. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered:

> (a) When a United States court of appeals has rendered a decision in conflict with the decision of another United States court of appeals on the same matter; or has decided a federal question in a way in conflict with a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision . . .
>
> (c) When a state court or a United States court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way that conflicts with applicable decision of this Court.

United States Court of Appeals for the Second Circuit, Local Rule, Part 1 § 0.23:

> The demands of an expanding case load require the court to be ever conscious of the need to utilize judicial time effectively. Accordingly, in those cases in which decision is unanimous and each judge of the panel believes that no jurisprudential purpose would be served by a written opinion, disposition will be made in open court or by summary order.
>
> Where a decision is rendered from the bench, the court may deliver a brief oral statement, the record of which is available to counsel upon request and

payment of transcription charges. Where disposition is by summary order, the court may append a brief written statement to that order. Since these statements do not constitute formal opinions of the court and are unreported or not uniformly available to all parties, they shall not be cited or otherwise used in unrelated cases before this or any other court.

STATEMENT OF THE CASE

The petitioner, Menachem Pri-Har, was convicted on January 10, 1994, followng a jury trial in the Federal Court for the Southern District of New York, Hon. John E. Sprizzo, D.J., presiding, of each and every count of a 24-count indictment charging Pri-Har with conspiracy to defraud the United States Department of Agriculture ("USDA") in relation to its grain subsidy program, entitled the Export Enhancement Program ("EEP"), and wire fraud, in violation of 15 U.S.C. § 714m(a) and 18 U.S.C. § 1343, and other counts of conspiracy to defraud various banks, and bank and wire fraud, in violation of 18 U.S.C. §§ 371, 1014, 1343 and 1344.

On May 12, 1994, Pri-Har appeared for sentencing. Despite extensive written submissions establishing the legal insufficiency of the evidence, and the deficient conduct of trial counsel in his summation, Judge Sprizzo summarily denied Pri-Har's motion for a judgment of acquittal under Fed.R.Crim.P. 29(c), and his motion for a new trial under Fed.R.Crim.P. 33, without making any written findings. 5A-9A. Pri-Har maintained before the district court, among other things, that the testimony of various government and bank officials, that he had orally misrepresented material facts to them to obtain government subsidies and/or loan financing, was utterly belied by the direct evidence adduced at the trial, including testimony from other government witnesses and the express language of numerous application and loan documents executed by the parties, some of which even expressly disclaimed reliance upon contrary oral representations.

Judge Sprizzo thereafter sentenced Pri-Har to 168 months' incarceration to be followed by five years' supervised release. Judge Sprizzo also ordered Pri-Har to pay $39 million in restitution for losses allegedly sustained by the various banks, and imposed a $1 million dollar fine and the mandatory special assessment.

Pri-Har duly appealed his conviction, raising numerous and substantial points of law in his opening and reply briefs and letter amendments, collectively totalling in excess of 170 pages, which established not only that Pri-Har's conviction was infirm because of the district court's faulty jury instructions and its denial of Pri-Har's motion for a new trial, but that the Government's evidence was legally insufficient to establish Pri-Har's guilt as to each and every count of the indictment, and in fact, pointed overwhelmingly to his innocence.[1]

Nevertheless, a panel of the court of appeals for the second circuit affirmed Pri-Har's conviction by summary order dated January 3, 1995, *United States v. Menachem Pri-Har,* Dkt. No. 94-1305 (Hon. Jon O. Newman, Chief Judge, and Hon. J. Edward Lumbard and Hon. Thomas J. Meskill, Circuit Judges). Rejecting each of Pri-Har's substantial claims in a cursory fashion in its four-page decision, the court ruled, without any supporting findings or rationale, that the evidence was sufficient to uphold Pri-Har's conviction on all of the counts in the indictment; the district court's jury instructions on willfulness were proper and *Ratzlaf v. United States,* 114 S.Ct. 655 (1994) did not apply; and, Pri-Har's trial counsel was constitutionally effective in his summation. 1A-4A.[2]

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[1] For the sake of judicial economy and convenience, the briefs of the parties have not been reprinted because of their length, but they will be included in the joint appendix in the event that this Court grants the petition for writ of certiorari.

[2] The court of appeals had jurisdiction over Pri-Har's appeal pursuant to 28 U.S.C. § 1291 because it was an appeal from a final judgment entered on July 20, 1994, in United States District Court for the Southern District of New York. The notice of appeal was timely filed and entered on July 21, 1994.

REASONS FOR GRANTING THE WRIT

I. THIS COURT SHOULD EXERCISE ITS SUPERVISORY POWER AND GRANT THE PETITION FOR WRIT OF CERTIORARI WITH RESPECT TO THE COURT OF APPEALS' SUMMARY ORDER AFFIRMING MR. PRI-HAR'S CONVICTION PURSUANT TO ITS LOCAL RULE, PART 1 § 0.23, WHERE THE COURT OF APPEALS' SUMMARY AFFIRMANCE OF PRI-HAR'S CONVICTION, WITHOUT ANY SUPPORTING FINDINGS OR RATIONALE, IS A VIOLATION OF PRI-HAR'S STATUTORY RIGHT OF APPEAL UNDER 28 U.S.C. § 1291, AND IS TANTAMOUNT TO AN ARBITRARY ARREST AND IMPRISONMENT IN VIOLATION OF PRI-HAR'S FUNDAMENTAL RIGHT TO DUE PROCESS OF LAW UNDER THE FIFTH AMENDMENT. PRI-HAR CONCLUSIVELY ESTABLISHED ON APPEAL THAT THE GOVERNMENT'S OWN EVIDENCE NOT ONLY FAILED TO ESTABLISH THE ESSENTIAL ELEMENTS OF THE CRIMES CHARGED, BUT POINTED OVERWHELMINGLY TO PRI-HAR'S INNOCENCE.

"It is axiomatic that a conviction upon a charge not made or upon a charge not tried constitutes a denial of due process." *Jackson v. Virginia*, 443 U.S. 307, 314 (1979). The right to a trial itself "presumes as well that a total want of evidence to support a charge will conclude the case in favor of the accused . . . [thus securing] . . . to an accused the most elemental of due process rights: *freedom from a wholly arbitrary deprivation of liberty.*" *Jackson v. Virginia*, 443 U.S. at 314, citing *Thompson v. Louisville*, 362 U.S. 199 (1960).

Due process requires that there at least be sufficient prima facie evidence so that "any rational trier of fact could have fond the essential elements of the crime beyond a reasonable doubt." *United States v. Starr*, 816 F.2d 94, 98 (2d Cir. 1987), citing *Jackson v. Virginia*, 443

U.S. at 319. *See In Re Winship,* 397 U.S. 358, 264 (1970) ("Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged"). The circumstances of the case still must point conclusively to the guilt of the accused and the proof offered by the Government must exclude every reasonable hypothesis except that of guilt. *Adams v. Evett,* 114 S.Ct. 1365 (1994). *See, e.g., United States v. Scott,* 437 U.S. 82, 97 (1978) (failure of proof requires acquittal when the Government does not submit sufficient evidence to rebut a defendant's factual defense of insanity); *United States v. Diogo,* 320 F.2d 898, 907 (2d Cir. 1963) (government must negative any reasonable interpretation that would make defendant's statement factually correct). Indeed, the court of appeals for the Second Circuit has itself stated:

> . . . [I]n America we still respect the dignity of the individual, and [a defendant] . . . is not to be imprisoned except on definite proof of a specific crime.

United States v. Mulheren, 938 F.2d 364, 368 (2d Cir. 1991), quoting *United States v. Bufalino,* 285 F.2d 408, 420 (2d Cir. 1960) (Clark, J. concurring).

This Court has also recognized that the due process guarantee of a right to be heard includes the right to be heard in a *meaningful* manner. *Matthews v. Eldridge,* 424 U.S. 319, 333 (1976). That right may be impaired unless the decision-maker is required to state reasons for its decision. *Goldberg v. Kelly,* 397 U.S. 254, 267, 211 (1970). Generally, the requirement of an explanation contributes to accuracy and fairness by promoting consideration of all the relevant factors and by enabling the parties and reviewing courts to ensure that no error has occurred. *See, e.g., Wolff v. McDonald,* 418 U.S. 539, 565 (1974) (due process requires "a written statement of the fact-findings as to the evidence relied upon and the reasons

for the [prison] disciplinary action taken"); *Morrissey v. Brewer*, 408 U.S. 471, 489 (1972) (due process requires "a written statement by the factfinders as to the evidence relied on and reasons for revoking parole"). Indeed, the court of appeals for the second circuit has itself stated that "*a Sphinxlike* silence" may preclude "anyone from knowing whether [the decision-maker] acted in error." *United States v. Brown*, 479 F.2d 1170, 1173 (2d Cir. 1973). *See Ben David v. Travisono*, 495 F.2d 562 (1st Cir. 1974) ("[A] court should let the parties . . . know why it acts, and on what factual basis"). *See also United States v. Merz*, 376 U.S. 192, 199 n. 4 (1964) ("The Hague Convention . . . by Article 79 provides that an arbitration award 'must give the reasons on which it is based.' ").

In this case, the court of appeals' procedure of affirming Mr. Pri-Har's conviction by summary order pursuant to its Local Rule, Part 1 § 0.23, without any supporting findings or rationale, violates Mr. Pri-Har's statutory right to appeal under 28 U.S.C. § 1291 and his right to due process, especially since Pri-Har established not only that the evidence was legally insufficient to convict him, but that he was innocent of the crimes charged. Of special concern is that the resolution of appeals by summary order, as in this case, apparently has become the rule—not the exception—in the second circuit.

Indeed, it would be tantamount to an arbitrary arrest and imprisonment to incarcerate Mr. Pri-Har for fourteen (14) years where neither the district court nor the circuit court have provided findings or reasoning upon specific evidence to substantiate Pri-Har's conviction. Pri-Har conclusively demonstrated on appeal that the evidence, even if construed in a light most favorable to the Government, established his innocence as a matter of law, and that the jury conviction for the essential elements of the crimes charged was based upon mere speculation or surmise.

Turning to the facts of this case, it should be noted at the outset that the centerpiece of the Government's case was the testimony of its key witness, Isaac Fattal, who was forced to *admit* that he had intentionally perjured himself at least twice in front of the jury—when he first denied even meeting with a friend of Mr. Pri-Har, one Albert Ohana, and then denied soliciting a bribe for $250,000.00 from Ohana in exchange for his (Fattal's) not testifying against Pri-Har—after defense counsel confronted Fattal with a transcript of the conversation which was secretly recorded by Ohana. A conviction based upon perjured testimony offends due process and cannot stand whether or not the prosecution knew of the perjury. *Sanders v. Sullivan*, 863 F.2d 218 (2d Cir. 1988) (perjured testimony, standing alone, is a violation of an accused's due process rights), *United States v. ex rel. Sostre v. Fecta*, 513 F.2d 1313 (2d Cir.), *cert. denied*, 423 U.S. 841 (1975) ("claim that the conviction was based on perjurious testimony goes to the very heart of the criminal process"). As this Court has stated: "It is of no consequence that the falsehood bore upon the witness' credibility rather than directly upon defendant's guilt. A lie is a lie, no matter what its subject . . . ." *Napue v. Illinois*, 360 U.S. 264, 269-70 (1959). Also, "[W]hen truthful testimony not only would have cast doubt on the witness' credibility but also would have tended to corroborate the defendant's version of the facts, the perjury is all the more pernicious". *Taylor v. Lombard*, 606 F.2d 371, 375 (2d Cir. 1979). On this ground, alone, the court of appeals should not have permitted Pri-Har's conviction to stand since it was based upon perjurious testimony of the Government's key witness.[3]

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[3] Regarding Fattal's testimony, Judge Sprizzo observed during the trial that *"There are some people who can't say anything straight."*

A. The So-Called "USDA Fraud" (Counts 1-10)

First, the trial record was devoid of evidence from which the jury could find that Pri-Har knowingly violated EEP regulations in connection with the grain subsidy applications of Red Rock Commodities ("RRC"), which allegedly contained false statements regarding RRC's affiliation with Olges, Ltd. ("Olges"), an Israeli corporation which allegedly was falsely represented as a foreign buyer of barley, and the prices at which RRC sold barley to Olges, so as not to undercut the USDA's minimum acceptable price ("MAP"), representing the market price for the commodity in that country.

The Government's own witness testimony indicated that Pri-Har, an Israeli citizen whose knowledge of English was limited, did not read the EEP regulations, did not know its specific requirements, and possessed only a general knowledge of the program's existence. Nor was there evidence presented that Pri-Har was ever informed it was a violation of EEP regulations to sell to a foreign buyer who was a subsidiary or affiliate, or that the EEP regulations had adopted a "minimum price" at which the grain had to be sold to the foreign buyer. Indeed, the direct evidence established that Pri-Har, as well as other Red Rock employees, clearly represented to USDA officials in conversations and *written* submissions that Olges was acting as an agent for other foreign buyers in Israel, thus clearly reflecting a truthful presentation and demonstrating a lack of any intent to deceive the USDA—had there been a scheme to defraud the USDA regarding the Olges' status, the names of other foreign customers would not so clearly have been provided the USDA by RRC employees. Further, the "minimum acceptable price" *is not even publicly disclosed* by the USDA, and thus a finding that Pri-Har or anyone else subverted this requirement was simply not possible. Moreover, the evidence established with unmistakable clarity that Pri-Har was unfamiliar with the details of RRC's subsidy applications since the prepara-

tion of such applications was the responsibility of other persons.

The evidence also did not support a finding by the jury that Pri-Har intended or contemplated any harm to the federal government. While it is true that RRC applied for and received eight (8) government subsidies totalling approximately $4 million dollars, it is equally true that RRC purchased, exported and sold American grains to eligible countries for each and every subsidy it received as required by the program for the loan subsidies. Indeed, the subsidy money was "recirculated" to the American farmers, whom RRC paid "up front" for the inflated price of the commodities—including the amount of the government subsidy ultimately awarded. Underscoring this lack of harm was the USDA's decision to refrain from taking any administrative action against RRC, such as recovery of the bonuses. Further, the USDA paid RRC bonuses as late as February, 1993, long after USDA officials participated in a consensual recording of Pri-Har at the direction of federal agents. Indeed, summary affirmance of Pri-Har's conviction on these counts is contrary to the court of appeals' own opinion in *United States v. Mittelstaedt*, 31 F.3d 1208 (2d Cir. 1994), holding that a mail fraud scheme to deprive a government entity of its right to control public expenditures must contemplate an actual harm to that entity.

B. The So-Called "Wheat Fraud" (Counts 10-12)

With respect to the Wheat Fraud counts, the evidence did not support the Government's theory that Pri-Har *verbally* misrepresented to the financing banks that they would be financing Olges' purchase price of wheat from the Israeli farmers, when the actual price of the wheat was much lower, in order to obtain more money from the lending banks than was actually needed to finance these purchases. The testimony of the bankers who made wheat loans to Pri-Har was utterly belied by overwhelming documentary evidence which established beyond cavil, con-

sistent with Pri-Har's testimony, that the banks were clearly informed in writing that they were extending financing based upon a pricing formula in the *RRC/Olges contract* (established by reference to a Government of Israel formula), and *not* Olges's purchase price. Neither the RRC/Olges agreement, the Certificates of Price, nor any other loan document submitted by RRC in order to obtain financing and receive payment, stated that the pricing formula in the RRC/Olges contract constituted the price that Olges paid to the Israeli farmers. In the face of such overwhelming documentary evidence, no reasonable juror could find Pri-Har guilty of the crimes charged. *Anderson v. Bessemer City*, 470 U.S. 564, 575 (1985) ("Documents or objective evidence may contradict the witness' story; or the story itself may be so internally inconsistent or implausible on its face that a reasonable factfinder would not credit it. Where such factors are present, the court of appeals may well find clear error even in a finding purportedly based on a credibility determination"); *United States v. Race*, 632 F.2d 1114 (4th Cir. 1980) (whenever defendant's statement or action under contract accords with reasonable construction of contract language, government will not have carried burden of negativing any reasonable interpretation that would make defendant's statement factually correct).

Nor did the Government evidence establish a fraudulent scheme "reasonably calculated" to deceive persons of "ordinary prudence and comprehension", an essential element of the crime charged, despite the Government's argument to the contrary and the court of appeals' apparent adoption of the Government position. Prior to this decision, the court of appeals for the second circuit, as well as the third and fifth circuit courts of appeals, have all held that proof of a scheme "reasonably calculated" to deceive persons of "ordinary prudence" was required in a fraud case. *United States v. Regent Office Supply Co.*, 421 F.2d 1174, 1181 (2d Cir. 1970) (fraud case requires

proof of false representations "reasonably calculated" to induce purchasing agents of "ordinary prudence"); *United States v. Pearlstein*, 576 F.2d 531, 535 (3d Cir. 1978) (same); *Silverman v. United States*, 213 F.2d 405, 407 (5th Cir. 1954) (same). By contrast, the court of appeals for the first circuit apparently holds that such proof is not required. *See United States v. Faulhaber*, 929 F.2d 16 (1st Cir. 1991).

In this case, no reasonable banker of ordinary prudence and comprehension would have lent such large sums of money—$11,988,000.00 by Standard Chartered Bank and 2,000,000.00 by BNP—based upon mere verbal representations. This is especially true since the bank loan agreement with Standard Chartered Bank included a merger/integration clause which disclaimed and precluded reliance upon contrary oral representations. Indeed, Mr. Pri-Har's conviction surely cannot stand here because the banks could not even "survive a motion for summary judgment in a civil suit . . . based on a false pretenses theory, even under the lower burden of proof applicable to civil cases." *United States v. D'Amato*, 39 F.3d 1249 (2d Cir., 1994). *See Gruman Allied Industries, Inc. v. Rohr*, 748 F.2d 729 (2d Cir. 1984) (disclaimer clause of purchase agreement barring reliance upon oral representations, precluded action for fraud and misrepresentation).

In any event, this Court should grant certiorari not only because the evidence established Mr. Pri-Har's innocence, but to resolve the conflict in the circuit courts regarding whether proof of a scheme reasonably calculated to deceive persons of "ordinary prudence and comprehension" is required in a fraud case.

C. The So-Called "Dresdner Bank Fraud" (Counts 13-17)

With respect to the Dresdner Bank Fraud, the Government did not prove an essential element of the crime alleged in the indictment, that Pri-Har fraudulently informed Dresdner Bank about fictitious sales of wheat by RRC in

Israel to regain control of the Israeli Emergency Wheat Program, because the evidence established that RRC's wheat sales had in fact occurred at a price approximating that represented to the banks. Moreover, the Government witnesses conceded that Pri-Har's attempt to regain control of the Wheat Program was prompted by his desire to *repay* the wheat loans which were due the financing banks, including Dresdner Bank, and thus there was absolutely no evidence from which to infer another essential element, that Pri-Har intended to cause any actual harm or loss to the bank. *United States v. Starr*, 816 F.2d 94, 98 (2d Cir. 1987); *United States v. Regent Office Supply Co.*, 421 F.2d 1174, 1181 (2d Cir. 1970). Again, this evidence establishes with unmistakable clarity Pri-Har's innocence of the crimes charged.

D. The So-Called "BNP Fraud" (Counts 18 and 19)

With respect to the BNP Margin Loan Fraud, the evidence clearly did not support the Government's theory that Pri-Har misrepresented to Banque Nationale de Paris ("BNP") that $1.5 million in margin loan money would be used to purchase futures contracts in connection with underlying commodities shipments financed by BNP, when in fact, the loan money was used for various other purposes. The Government could not refute on appeal conclusive evidence that Pri-Har truthfully represented to Barry Feigenbaum of BNP that he already had expensed RRC's own money for margin financing and was using BNP's money to reimburse RRC for margin it already had expended. Indeed, the Government's own witnesses established that RRC had expended $18 million in margin expenditures. Further, the BNP/RRC agreement did not require that the loan money be used for the purchase of futures contracts as alleged by the Government. Rather, paragraph 2.C.111 of the agreement states that financing was for margin *requirements*, a reference to RRC's margin calls, comprised not only of its buying of futures contracts, but also its overall daily positioning. On cross-

examination, Barry Feigenbaum conceded he was aware that BNP's financing would go to RRC's overall positioning. Thus, Feigenbaum's testimony that he and Pri-Har *verbally* agreed the margin loan money would be used for the purchase of specific futures contracts is contradicted by the plain language of the loan agreement, which called for $1.5 million in margin loan money to cover margin calls. *See Anderson v. Bessemer City*, 470 U.S. at 575 (discussing objective evidence, like documents, contradicting witness's story). Pri-Har's conviction surely cannot stand because, like the Wheat-Fraud counts, the bank could not even prevail in a civil suit on these facts. *United States v. D'Amato, supra.*

E. The So-Called "RAM Steel Fraud" (Counts 20-22)

With respect to the Ram Steel Fraud, the evidence did not establish that Pri-Har participated in a scheme to defraud BNP and ABN-AMRO banks by making false statements regarding Pri-Har's control of steel billets, which were intended to serve as collateral for the loans, since the evidence amply demonstrated that Pri-Har acted in good faith by investigating and dispelling suspicions that the steel billets had been stolen by Ram Metals ("Ram") in Israel. The evidence established that Pri-Har's own investigation revealed the steel billets were *not* missing or otherwise in Ram's control as of March, 1992, when financing was obtained, and that Pri-Har did not realize the steel billets were stolen by Ram until August, 1992. Indeed, the Government's key witness, Isaac Fattal, conceded that Pri-Har did not learn the steel was stolen until August, 1992, when he was informed of the theft by Yoav Peled of Ram—as also confirmed in recorded telephone conversations. *Anderson v. Bessemer City*, 470 U.S. at 575 (discussing objective evidence contradicting witness's story).

F. The Citibank and Bank of Tokyo Fraud (Counts 23 and 24)

With respect to the Citibank and Bank of Toyko counts, evidence that Pri-Har had listed Bronx and Brooklyn properties—which he concededly did not own—on financial statements was insufficient to establish that Pri-Har had knowledge of the unlawfulness of such conduct in light of Pri-Har's testimony that he had been duped into thinking he owned the fictitious properties by Neal Mandel, upon whom Pri-Har relied to manage Red Rock Holding's ("RRH") real estate, who had Pri-Har's power of attorney, and who was fired by Pri-Har and was arrested by the police, for similar fraudulent activity including the theft of RRH funds through misrepresentation regarding non-existent properties *as corroborated by Government witnesses.* Pri-Har's conviction cannot stand because the Government did not call Mandel as a witness to rebut Pri-Har's testimony, and thus, did not "negative" Pri-Har's statements. *Adams v. Evett*, 114 S.Ct. at 1365; *United States v. Scott*, 437 U.S. at 97 (failure of proof requires acquittal when Government does not submit sufficient evidence to rebut a defendant's factual defense of insanity); *United States v. Diogo*, 320 F.2d at 907 (government must negative any reasonable interpretation that would make defendant's statements factually correct); *United States v. Anderson*, 579 F.2d 455 (8th Cir. 1978) (same).

Further, any misrepresentation concerning the Bronx and Brooklyn properties was not of a sufficiently "material" nature to support conviction because the listed net value of the Bronx ($1.5 million) and Brooklyn ($2000) properties was minimal in relation to Pri-Har's other United States real estate, which was valued at approximately $14 million at the time of the $1 million Citibank loan and $40 million by the time of the Bank of Toyko loan. Also, regarding the Bank of Toyko loan, any misrepresentation concerning the Bronx and Brooklyn prop-

erties in the 1986 financial statement was clearly not material because Pri-Har's loan application and his updated 1988 financial statement which were submitted to the bank to obtain the loan were concededly devoid of any false statements and did not even list the Bronx and Brooklyn properties.

G. Financial Statement Fraud (Counts 10-12, 18-19, 20-22)

Finally, with respect to the Financial Statement Fraud, the Government did not prove that RRC's cash assets were in fact overstated in various financial statements. The statements were prepared by an accountant, Shelly Ganz, who did not testify at trial. The Government's expert witness, Robert Lynch, lacked personal knowledge of the information contained in the statements. Lynch conceded he had analyzed only RRC's loan deposits in Israel as reflected in documents provided by the Government, but he did not examine RRC's other bank accounts around the world which might have established an alternative source of income for the cash assets listed in the financial statements, as Pri-Har testified was evidenced by RRC's certified bank deposits in Venezuela. Unfortunately, the district court erroneously excluded the defense proffer of RRC's foreign bank records from Venezuela, which would have corroborated Pri-Har's explanation, on the ground that defense disclosure of the evidence to the Government was untimely under pertinent statutes—and by four (4) days under the court's scheduling order—even though the defense did not become aware of the need for the records until the Government's presentation of evidence during the trial.

The court of appeals' affirmance of Pri-Har's convictions on these counts, without testimony from the accountant, Mr. Ganz, who had personal knowledge of the financial records, and the court's erroneous admission of Mr. Ganz's work papers, is contrary to the approach taken by the court of appeals for the third circuit as reflected in *United States v. Pelullo*, 964 F.2d 193 (3d Cir. 1992).

There, reversal was required in light of the circuit court's ruling that it was error for the district court to admit the testimony of an agent, a certified public accountant, and the bank records that he analyzed, where the agent did not have personal knowledge of business-keeping practices of the bank. The affirmance of Pri-Har's convictions on these counts is also at odds with dicta by the court of appeals for the second circuit in a prior decision, *United States v. Helmsley*, 941 F.2d 71, 88-89 (2d Cir. 1991), in which the court observed there was ample reason to discount conclusions of an expert witness regarding the alleged overpayment of taxes where the expert had examined only a select sample of tax records and had neglected to examine tax records in total.

In sum, this Court should grant certiorari regarding the court of appeals' summary affirmance of Petitioner's conviction, without any supporting findings or reasoning, in light of such overwhelming evidence of Pri-Har's innocence. By granting certiorari, this Court will underscore the importance of an appellate court's articulating its findings and reasoning in determining whether a conviction was validly obtained, and thereby forge a procedural safeguard for minimizing error and preventing the danger of an arbitrary arrest and imprisonment. Otherwise, the practice of summarily affirming criminal convictions, without issuing any supporting findings or rulings, will recur and will deprive not only the Petitioner but numerous other litigants of valuable rights, including their statutory right of appeal under 28 U.S.C. § 1291 and due process of law under the Fifth Amendment. "For the interest of the United States in a criminal prosecution is not that it shall win a case, but that justice shall be done." *Jencks v. United States*, 353 U.S. 657, 668 (1957). *See Schlup v. Delo*, —— U.S. ——, No. 93-7901, 63 U.S.L.W. 4089 (Jan. 23, 1995) ("Concern about the injustice that results from the conviction of an innocent man has long been at the core of our criminal justice system. That concern is reflected, for example

in the 'fundamental value determination of our society that it is far worse to convict an innocent man than to let a guilty man go free.' *In Re Winship*, 397 U.S. 358, 372 (1970.)").

II. THIS COURT SHOULD CONSIDER THE NOVEL ISSUE OF WHETHER *RATZLAF v. UNITED STATES*, 114 S.Ct. 655 (1994), APPLIES TO THE FRAUD CRIMES FOR WHICH PRI-HAR IS CONVICTED

Following Mr. Pri-Har's conviction, this Court handed down a landmark opinion in *Ratzlaf v. United States*, 114 S.Ct. 655 (1994), in which the Court reversed a defendant's conviction for structuring cash transactions, holding that proof of a person's "willful" violation of the statute required that the Government establish the defendant acted with specific knowledge that the structuring he undertook was unlawful.

On appeal, Mr. Pri-Har argued that the district court committed plain error in his case by instructing the jury that to convict Pri-Har of the fraud crimes charged in the indictment, it only had to find that Pri-Har was aware of the general unlawfulness of his conduct—*not* that Pri-Har knew he was breaking a particular law.

Until this case, this Court apparently has not yet considered the parameters of *Ratzlaf*, and whether *Ratzlaf* should apply in a fraud case like this one. Contrary to the court of appeals' summary affirmance in this case, there is nothing in this Court's discussion of willfulness in *Ratzlaf* that would confine its rationale to the structuring statute. At least one circuit court, the third circuit, has extended the rationale of *Ratzlaf* to other crimes, thereby reversing an election fraud conviction under 18 U.S.C. § 1005 in *United States v. Curran*, 20 F.3d 560 (3d Cir. 1994). This Court should consider and resolve the novel issue of whether *Ratzlaf* extends beyond currency reporting cases and is applicable to the fraud crimes for which Pri-Har stands convicted.

III. THIS COURT SHOULD GRANT CERTIORARI WHERE PRI-HAR DEMONSTRATED ON APPEAL THAT HIS TRIAL COUNSEL WAS INEFFECTIVE FOR SIMPLY REFUSING TO ARGUE NUMEROUS DEFENSES AND EVIDENCE OF PRI-HAR'S INNOCENCE IN HIS SUMMATION DESPITE PRI-HAR'S SPECIFIC REQUEST IN WRITTEN SUMMARIES THAT THESE DEFENSES AND EVIDENCE BE RAISED

This Court should grant certiorari where Pri-Har demonstrated on appeal that he was deprived of his Sixth Amendment right to the effective assistance of counsel because his trial counsel refused to argue numerous, substantial defenses and evidence of Pri-Har's innocence in his summation, even though Pri-Har had expressly directed that counsel argue these defenses in thirty (30) pages of written summaries.

Strickland v. Washington, 466 U.S. 668 (1984) sets forth the two-part test to be applied in evaluating whether counsel's ineffectiveness deprives a defendant of his Sixth Amendment right to counsel. First, a defendant must show that "counsel's representation fell below an objective standard of reasonableness." *Id.* at 668. Second, a defendant must establish prejudice from his attorney's deficient performance. *Id.* at 692. "The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694, 695.

This Court has long recognized the right of a defendant under the Sixth Amendment to direct his counsel regarding the conduct of his defense, even permitting a defendant to proceed without counsel entirely if the right of counsel is voluntarily waived. *Faretta v. California,* 422 U.S. 806, 835-836 (1975). In *Strickland,* this Court underscored counsel's duty of loyalty to his client, and his

"overarching duty to advocate the defendant's cause." 466 U.S. at 688. Counsel must take all reasonable lawful means to attain the objectives of the client, although counsel is of course precluded from taking steps or in any way assisting in presenting false evidence or otherwise violating the law. *Nix v. Whiteside*, 475 U.S. 157, 166 (1986).

While it is true that challenges to an attorney's strategic or tactical decisions are disfavored, *Strickland v. Washington*, 466 U.S. at 689-690, it is equally true that ethical rules and prior case law establish that the duty of loyalty to a client encompasses an obligation to defer to the client's wishes on major litigation decisions. *See, e.g., In re "Agent Orange" Product Liability Litigation*, 800 F.2d 14, 17 (2d Cir. 1986) (". . . duty of loyalty to . . . client . . . encompasses an obligation to defer to the client's wishes on major litigation decisions . . . ."). *See also* ABA Standards for the Defense Function, Section 5.2(6) ("tactical decisions are the province of the lawyer *after consultation with his client* . . . .") (emphasis added); EC 7-8, p. 01 . . . 333 ("The lawyer should always remember that the decision whether to forego legally available objectives or matters *is ultimately for the client and not for himself* . . . in the event that the client in a non-adjudicatory matter insists upon a course or conduct that is contrary to the judgment and advice of the lawyer but not prohibited by disciplinary rules, the lawyer may withdraw from the employment") (emphasis added).

This case presents the novel question of whether a defendant, who expressly instructs counsel in detailed written summaries to argue substantive defenses and evidence of the defendant's innocence in counsel's summation, is deprived of the effective assistance of counsel where counsel for no principal reason simply refuses to defer to his client's wishes. Petitioner contends that under these circumstances, counsel's conduct cannot be con-

doned as sound trial strategy, *Strickland v. Washington,* 466 U.S. at 689-690, because counsel has violated the duty of loyalty to his client in refusing to advocate his client's cause and to defer to his client's wishes on major litigation decisions. 466 U.S. at 688. *See In re "Agent Orange" Product Liability Litigation,* 800 F.2d at 17; ABA Standards for the Defense Function, Section 5.2(6); EC 7-8, p. 01 . . . 333.

Nor can counsel's failure to defer to his client's wishes regarding the presentation of numerous substantive defenses—largely described in Point I, *infra,* pp. 10-18—be attributed, in any event, to sound trial strategy since the defenses and evidence which were neglected in the summation *were developed during the trial through counsel's examination of witnesses and presentation of evidence. See Calderon v. Siripongs,* —— U.S. ——, No. 94-920 (February 21, 1995), ruling below *Calderon v. Siripongs,* 35 F.3d 1308 (9th Cir. 1994) (no evidence that trial counsel made informed tactical decision not to present evidence concerning accomplice that petitioner alleges committed murder, and no tactical reason not to present such evidence at penalty phase of evidence). Rather than argue these substantive defenses and evidence as instructed by Mr. Pri-Har, counsel focused almost solely in his summation upon the credibility of Government witnesses, leaving the jury wholly ignorant of Pri-Har's defenses. Indeed, when the jury informed the district court during the trial that defense counsel's questioning and presentation of evidence left them hopelessly confused, the court promised the jury that counsel would make clear his defenses and marshall supporting evidence in his summation, an event which, unfortunately, never took place despite Pri-Har's written instructions to counsel to raise the defenses and supporting evidence of Pri-Har's innocence. In this regard, counsel's summation was arguably the most central stage of the proceedings in light of the length of the trial and the voluminous evidence which the jury had to consider and comprehend in arriving at a

verdict. This was a complex case—even for lawyers, much less lay persons—and an effective summation was essential not only to revive the jurors' memories concerning key points, but to help them make sense of the evidence.

In sum, this Court should grant certiorari to clarify the contours of counsel's obligations under the Sixth Amendment to defer to his client's wishes regarding the presentation of substantive defenses and exculpatory evidence in counsel's summation when there is no principal and countervailing reason to refuse to argue the defenses and evidence.

CONCLUSION

For the foregoing reasons, the petition for Writ of Certiorari should be granted.

Respectfully submitted,

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Dated: March 6, 1995

* Counsel of Record

APPENDIX

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APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 3rd day of January, one thousand nine hundred and ninety-four.

PRESENT: HONORABLE JON O. NEWMAN, Chief Judge.
HONORABLE J. EDWARD LUMBARD,
HONORABLE THOMAS J. MESKILL,
Circuit Judges.

94-1305

UNITED STATES OF AMERICA,
Appellee,

v.

MENACHEM PRI-HAR,
Defendant-Appellant.

ORDER

Appeal from the United States District Court for the Southern District of New York (John E. Sprizzo, Judge).

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York and was argued by counsel.

ON CONSIDERATION WHEREOF, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the judgment of the District Court be and it hereby is AFFIRMED.

Defendant-appellant Menachem Pri-har appeals the judgment of the District Court for the Southern District of New York (John E. Sprizzo, Judge) convicting him, following a jury trial, on all twenty-four counts of the indictment, which charged him with conspiracy, in violation of 18 U.S.C. § 371; wire fraud and bank fraud, in violation of 18 U.S.C. §§ 1343 and 1344; making false statements to the United States Department of Agriculture ("USDA"), in violation of 15 U.S.C. § 714(m); and making false statements in a bank loan application, in violation of 18 U.S.C. § 1014. Pri-har also challenges the sentence imposing 168 months' imprisonment, to be followed by five years' supervised release, and ordering him to pay $39 million in restitution, a $1 million fine, and a $1,200 mandatory assessment.

1. On appeal, Pri-har challenges the sufficiency of the evidence to support conviction on each count of the indictment. Pri-har was charged for his involvement in seven different fraud schemes, the facts of which are complicated and need not be stated here. We have reviewed the record and found, after drawing all reasonable inferences and resolving issues of credibility in favor of the verdict, *see United States v. Amato,* 15 F.3d 230, 235 (2d Cir. 1994), that the evidence was sufficient to uphold Pri-har's conviction on all counts.

2. Pri-har next contends that the Court improperly instructed the jury that the Government did not have to prove that he knew that he was breaking a particular law,

but only that he was aware of the general unlawfulness of his actions. Because Pri-har did not object to this charge, he has waived his claim unless the charge constituted plain error. *United States v. Smith*, 918 F.2d 1032, 1038 (2d Cir. 1990), *cert. denied*, 498 U.S. 1125 (1991). We find no such error here. The Court properly instructed the jury that it could convict only if it found that Pri-har acted intentionally and deliberately with the specific intent to defraud in carrying out the fraudulent scheme. Unlike the structuring statute at issue in *Ratzlef v. United States*, 114 S. Ct. 655 (1994), the fraud crimes charged in this case do not require a showing that the defendant specifically intended to violate a particular law. *See, e.g., United States v. Carpenter*, 791 F.2d 1014, 1035 (2d Cir. 1986), *aff'd*, 484 U.S. 19 (1987).

3. Pri-har also contests various evidentiary rulings. In particular, he challenges the Court's admission of certain evidence proffered by the Government and exclusion of allegedly exculpatory evidence proffered by Pri-har's counsel. We find no abuse of discretion. In any event, none of its rulings so unfairly prejudiced Pri-har as to warrant a new trial.

4. There is no merit to Pri-har's contention that the Court unfairly conducted the questioning of witnesses. The Court questioned both Government and defense witnesses during the trial, and instructed the jury that its verdict should be based upon the evidence alone, that nothing the Court said to witnesses or to counsel should affect the jury's decision, and that the Court did not have any opinion as to the facts or what the verdict should be.

5. Pri-har also claims that trial counsel was constitutionally ineffective in failing to raise certain defenses in his summation, even though counsel had developed a number of these defenses at trial. But, far from being ineffective, counsel conducted the defense competently, notwithstanding the overwhelming evidence of Pri-har's guilt. Moreover, counsel raised many of the arguments

Pri-har claims were omitted, and counsel's failure to raise other arguments amounted to a strategic decision.

6. Finally, Pri-har raises a number of challenges to his sentence. Specifically, he claims that the Court erred in calculating the loss from some of his fraud schemes and in enhancing his sentence four levels for being an organizer or leader of five persons, two levels for obstruction of justice, and four levels for personally deriving more than $1 million in gross receipts from an offense affecting a financial institution. Each of the challenged sentencing rulings is supported by the facts and involves a proper application of the Guidelines. Pri-har also challenges the Court's imposition of $1 million in fines and $39 million in restitution on the ground that there was insufficient evidence of his ability to pay these sums. This claim is meritless, particularly because the Probation Department and Court found that Pri-har was attempting to conceal his assets.

/s/ Jon O. Newman
Chief Judge

/s/ J. Edward Lumbard

/s/ Thomas J. Meskill
Circuit Judges

[Excerpt from Trial Transcript from the Southern District Court for the Southern District of New York]

* * * *

[2] THE COURT: What do you want to deal with first?

MR. McCORMICK: Well, there are some undecided Rule 29 and Rule 33 motions, your Honor. Then there is quite a bit of ground to cover.

THE COURT: I don't need a lot of argument. You can argue five minutes if you want.

MR. HARWOOD: Judge, my name is Donald Harwood. I represent the defendant Pri-Har. We have filed rather extensive papers.

THE COURT: I have read your papers.

MR. HARWOOD: OK. I would state for the record that I had wanted to file reply papers.

THE COURT: Whatever you are going to say in your reply papers, say it now.

MR. HARWOOD: OK.

Judge, on each of the counts we have asked that there be the verdict of guilty set aside. On the USDA count you have read the papers.

THE COURT: I have read the papers. Most of it bore only a passing resemblance to the evidence I heard at trial.

MR. HARWOOD: With regard to the USDA count, I would like to start with that, if I could.

THE COURT: You have five minutes. You can start wherever you would like.

[3] MR. HARWOOD: There was no showing here under the Regent case that there was an intent to cause harm to the USDA. The testimony in this case indicated that any subsidy payment that was made—and we don't contest that there were eight subsidy payments made here totaling $4 million—but each of those payments made went directly to the American farmer, and in this case. in fact, the evidence indicates that Red Rock would pay the American farmer, and the testimony from both Mr.

Fattal and Mr. McElvain from the USDA was only after the farmer had been paid and after the wheat had been shipped to Israel would Red Rock then seek reimbursement.

THE COURT: The government's case law seems to be against on you that point, the Circuit case law, which I am not obliged to ignore.

MR. HARWOOD: I would suggest that this case is unique in the sense that none of the Second Circuit cases involved a situation where you have money being paid up front to the American farmer, and you have testimony from McElvain that in terms of harm—he was rather candid, at least to the federal agent, if you remember the cross-examination—

THE COURT: The government's cases stand for the broad proposition that deciding how and to whom to give your money is defrauding enough.

[4] MR. HARWOOD: Judge, on that point, I would ask you to consider that with regard to control, in February McElvain, after he'd already had a tape-recorded conversation with Mr. Pri-Har, at the behest of the federal agents still was paying the subsidies. It defies logic how any reasonable juror could find on that evidence where they never moved to recover any of the subsidies even paid out—

THE COURT: That wasn't even so clear, by the way. I remember the evidence on that. It wasn't entirely clear. There were two different offices; one was in one place and one was in the other. I remember the evidence. That part of your motion is denied.

MR. HARWOOD: The last thing I would like to say, Judge, on USDA: I also put in an argument concerning knowledge—

THE COURT: Believe me. I heard the trial. The evidence shrieked with your client's false statements. Forget it. I heard the trial; I saw your papers. For the most part I thought the arguments were frivolous. The motion for a new trial and the Rule 29 motion are denied.

To the extent that you are raising arguments about ineffective assistance of counsel, let me tell you, I saw the trial; I observed the performance of the defense lawyers. They did a fine job, far above what I would expect in the federal court, and certainly not below the standards [5] set forth by the Supreme Court in Strickland. The only count as to which you have even a passing argument is the one dealing with the bank. So why don't you get that.

MR. HARWOOD: Could I address that briefly, Judge.

THE COURT: Yes.

MR. HARWOOD: Because you reserved on that.

THE COURT: The rest of them I thought were just a waste of time, quite frankly, when I read your papers. But go ahead.

MR. HARWOOD: With regard to Dresdner, that was the situation where Mr. Pri-Har was attempting to convince Detective Wirschky of Dresdner Bank to get back in control of the program, and again the principal argument we have raised in the papers is—

THE COURT: The argument they raised was that that was a valuable right which you were trying to get for yourself, and that is enough to make out the offense.

MR. HARWOOD: Under the Regent case there has to be some showing, not just a deceitful representation.

THE COURT: They say that the power to control the wheat program after the banks have taken it over is in itself a tangible property right which your misrepresentations were geared to achieving, and that is enough to meet the standard.

[6] MR. HARWOOD: Judge, I disagree with that for this reason: Even had Mr. Pri-Har convinced Wirschky to help him, in effect, marketing the wheat so that he could recover losses for the banks, even Wirschky said he simply wanted to repay the loans, the banks would not have lost control of the wheat program because the uncontroverted evidence is they held the warehouse receipts, so

that any sale of wheat that Pri-Har had negotiated would have to be approved by the banks. If you look at the exhibits and look at the contracts, particularly the Standard Chartered agreement, just because Pri-Har said, hey, your liquidator is selling this out way below what I could market it at, at least let me try to market it for you, they wouldn't have lost the property right because they still held the warehouse receipts. And the uncontroverted evidence was that whoever had the receipt—

THE COURT: Why was your client trying to get control of it if it wasn't worth something to him?

MR. HARWOOD: Because he wanted to repay the loans.

THE COURT: It was worth something to him, wasn't it?

MR. HARWOOD: The case law is whether there is a benefit to him.

THE COURT: No, the question is whether or not he [7] was seeking to obtain some pecuniary advantage. That is what we are talking about here. And he submitted false documentation, and, as far as I am concerned, that was the only count on which I reversed and, having read the government's papers and seeing the applicable case law, that motion is denied as well.

MR. HARWOOD: Judge—

THE COURT: That is it. The motion is denied. There is a Court of Appeals.

MR. HARWOOD: OK, Judge.

THE COURT: That is what they are there for. Take it up there.

I read your papers, and for the most part I found that the arguments with respect to the sufficiency of the evidence, in my view, bordered on frivolous. Maybe the Court of Appeals will see it differently. The arguments based on ineffective assistance of counsel I think are equally frivolous. I saw the trial. I saw the performance of counsel, and I heard his summation. Believe me, given the nature of the overwhelming evidence which the gov-

ernment had against your client, their representation was about as effective as you could get under the circumstances. If the Court of Appeals disagrees, they will send it back to me. But those motions both under Rule 29 and a new trial based upon ineffective assistance of counsel in my view are not [8] even close to the line of being meritorious. Therefore, they are denied.

Let's get on with the rest of this.

* * * *

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 23 day of February one thousand nine hundred and ninety-five.

Docket Number 94-1305

UNITED STATES OF AMERICA,
Appellee,

-v.-

MENACHEM PRI-HAR,
Appellant.

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by Appellant MENACHEM PRI-HAR

Upon consideration by the panel that decided the appeal, it is

Ordered that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

FOR THE COURT
GEORGE LANGE III
Clerk

By: /s/ Carolyn Clark Campbell
CAROLYN CLARK CAMPBELL
Chief Deputy Clerk